



**Boston Bar**  
ASSOCIATION

2008

FALL

# Bankruptcy Law Section

## Newsletter

Fall 2008

# Section Co-Chair Corner

Dear Friends and Colleagues:

Our Section is very busy indeed! Thanks to the hard work of the Section's newly formed Education Committee and its Co-Chairs, Nina Parker and Jeanne Darcey, we started the new year in September with a full schedule of Brown Bag lunches running through June 2009 on a wide variety of business and consumer topics. The Section has also scheduled many important CLE programs and remains very responsive to the needs of its members, most recently adding a program on November 3 that covered important issues in bankruptcy practice arising as a result of the developing Credit Crisis. The Section offers many opportunities to stay on top of the latest developments in the law and connect with fellow bankruptcy practitioners and I encourage everyone to take advantage of the wonderful programs that the Education Committee has put together. I also encourage you to get in touch with Nina or Jeanne if you have any programming ideas for the coming year.

The Section has embarked on a number of very exciting projects over the past year. Right now, the Section is in the midst of a Strategic Planning initiative. A special task force, co-chaired by Michael Pappone and Nina Parker, has been hard at work over the past year talking to members to learn first hand about the Section's strengths, weaknesses, opportunities and threats. I am looking forward to completion of the task force report and sharing the findings and recommendations with the membership as we continue to look for new ideas to maintain the vitality and relevance of the Section for its members. In addition, the Section is continuing its consideration of problems in the area of Consumer Finance. Adam Ruttenberg chairs the Section's task force exploring legal issues in consumer finance that have arisen as a result of the recent credit crisis. The task force reaches across a number of BBA Sections, public and non-profit agencies in an effort to determine what role the BBA might play in this rapidly changing area of the law.

To add to this impressive list of initiatives, the Section is presently working to update its website to include information about all of the Section's Committees and co-chairs, their mission and their goals for the upcoming year. When was the last time you looked at the Section's webpage on the BBA website? Take a minute to look at the Section's webpage on the BBA's site, <http://www.bostonbar.org/sc/bk/index.htm>, and contact one of the co-chairs of the Committees listed there and consider getting involved. I look forward to greeting you at one of the Section's events in the coming year.

—Don Lassman

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## Board of Editors

The Editors are now accepting applications for appointment to the **Board of Editors of the Bankruptcy Section Newsletter for 2008-2009**. Members of the section with an interest in getting more involved with the Section, writing on practice and procedure or substantive developments, or sharing a obsession with where the comma goes should contact the 2008 - 2009 editors:

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## ATTENTION PRACTICE LEADERS: PLEASE CONFIRM THAT YOUR ATTORNEYS ARE MEMBERS OF THE BANKRUPTCY SECTION!

If your firm coordinates and pays BBA membership dues for you, please confirm that they are signing up all of the bankruptcy attorneys in your firm for the section. Accurate and complete membership lists are vital to ensuring the section effectively communicates with its members. We have some concerns that we are not reaching all interested attorneys at BBA member firms, so please take the time to confirm that your firm attorneys signed up to fully participate in the Bankruptcy Section.

**Curious about your member status?** Call the BBA at 617-742-0615.

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## 2008 – 2009 Calendar Dates:

The Bankruptcy Section meets the 3rd Tuesday of every month at 12:15 pm.

The Steering Committee meets the 2nd Friday of every month at 8:30 am

Meetings are held at the BBA, 16 Beacon Street, Boston

### Pack Those Brown Bag Lunches And Come On Down

Mark your calendar for the upcoming dates and watch for full details and program descriptions. If you have a suggestion for a topic for any of the remaining dates please contact the chairpersons of the CLE Committee Nina Parker at [NParker@Ninaparker.com](mailto:NParker@Ninaparker.com) or Jeanne Darcey at [JDarcey@eapdlaw.com](mailto:JDarcey@eapdlaw.com).

#### **Brown Bag Lunch Meetings: Tuesday, December 16, 2008**

Using ADR in Consumer Bankruptcy Matters

#### **Tuesday, January 20, 2009**

#### **Tuesday, February 17, 2009**

Chatting with the Chapter 13 Trustee

#### **Tuesday, March 17, 2009**

The “new” homestead law

#### **Tuesday, April 21, 2009**

#### **Tuesday, June 16, 2009**

#### **Financial Literacy Program Dates:**

**January 7, 2009**, 4:00 - 5:00 pm

Volunteer Training

**January 7, 2009**, 5:00 pm

Volunteer Appreciation Reception

#### **Steering Committee Meetings:**

Friday, December 12, 2008

Friday, January 09, 2009

Friday, February 13, 2009

Friday, March 13, 2009

Friday, April 10, 2009

Friday, May 08, 2009

Friday, June 12, 2009

#### **2009 Bench Bar Conference:**

Thursday, May 14, 2009

## Members on the Move

John Loughnane has joined the Boston office of Eckert Seamans Cherin & Mellott, LLC as a Member, practicing in the firm’s Business Division.

Robert Somma has joined Posternak Blankstein & Lund LLP of Boston as Senior Counsel in the firm’s Bankruptcy, Workout and Business Reorganization practice.

Any section member with news to share with the section should feel free to contact the editors.

## Case Summaries, by Joseph J. Koltun Craig & Macauley, Boston

### Late-discovered failure to complete credit counseling does not result in dismissal

In re Mattingly, 2008 Bankr. LEXIS 1925 (Bankr. D. Mass. 2008) (Hillman, J.)

A Chapter 7 debtor failed to complete and file a Certificate of Credit Counseling as required by 11 U.S.C. § 109(h), and instead completed a course on personal financial management and filed a certificate to that effect. No parties in interest filed an objection based on the lack of a Certificate of Credit Counseling. The Court held that it would be inequitable to dismiss the Debtor's case at such a late stage and entered an order waiving the credit counseling requirement after finding (i) the Debtor reasonably attempted to comply with the statutory provisions, (ii) the late discovery of the mistake precluded any efforts by the Debtor to cure the mistake, and (iii) no party in interest objected or sought dismissal of the Debtor's case on that basis.

### Plan litigation trustee's claims barred by application of in pari delicto doctrine

Nisselson v. Lernout, et al., 2008 U.S. Dist LEXIS 56216 (D. Mass. 2008) (Saris, J.)

Lernout & Hauspie Speech Products N.V. ("L&H") and Dictaphone Corporation ("Dictaphone") completed a stock for stock merger in 2000. The merger was completed by merging Dictaphone into a wholly owned subsidiary of L&H, which corporate entity survived and then changed its name to Dictaphone or "New Dictaphone" as set forth in the Court's opinion. Shortly after the completion of the merger, numerous allegations of fraud were made against L&H, L&H's stock plummeted and L&H and New Dictaphone filed for bankruptcy protection. All of New Dictaphone's claims arising from the merger were assigned to the Dictaphone Litigation Trust (the "DLT").

The trustee of the DLT filed an action seeking to recover damages against numerous parties including (i) L&H's investment banker, (ii) former directors of Dictaphone, and (iii) other

defendants. In 2004, the Court granted motions to dismiss made by L&H's investment banker and other defendants based on the doctrine of in pari delicto, and the Court's decision was affirmed by the First Circuit. See *Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006). Former directors of Dictaphone then moved to dismiss the remaining claim against them for breach of fiduciary duty based various grounds, including (i) the in pari delicto doctrine, and (ii) Delaware Code Section 102(b)(7).

The Court first noted that generally speaking the in pari delicto defense bars plaintiffs from recovering damages resulting from their own wrongdoing. In order to apply in pari delicto, the Court stated two criteria must be met: (i) the plaintiff, as compared to the defendant, bears at least substantially equal responsibility for the wrongs the plaintiff seeks to redress, and (ii) preclusion of the claim would not interfere with the law or otherwise contravene the public interest. The Court first held that the law of the case doctrine did not apply and that an independent inquiry was necessary, because the wrongs being alleged by the DLT were different than those previously dismissed by the First Circuit. Notwithstanding this finding, the Court went on to conclude that New Dictaphone was as complicit in the wrongs alleged, that the corporate insider exception to the in pari delicto doctrine did not apply, that the equities were not clear cut and thus did not lie in the DLT's favor, and that the DLT's claims for breach of fiduciary duty were thus barred by the in pari delicto defense.

The DLT also argued that the directors violated their fiduciary duties under Delaware law by failing to learn of the alleged fraud at L&H. Defendants countered by claiming that Old Dictaphone had a provision in its certificate of incorporation pursuant to Delaware Code Section 102(b)(7) that eliminated its directors liability for damages for breach of fiduciary duty. The Court noted that although there is an exception for acts or omissions not made in good faith, the DLT's complaint fell well short of alleging such conduct. As a result, the Court allowed the director defendants' motion to dismiss.

## Case Summaries, By Kathleen A. Rahbany Craig & Macauley, Boston

### **An assignee of a claim must provide sufficient evidence of assignment to overcome an objection to its status as a creditor.**

B-Real, LLC v. Melillo (In re Melillo), 2008 Bankr. LEXIS 1956 (B.A.P. 1st Cir. 2008).

The Bankruptcy Appellate Panel affirmed the bankruptcy court's order sustaining the debtors' objection to B-Real, LLC's ("B-Real") proof of claim because B-Real failed to establish that it is a creditor of the debtors. B-Real filed a proof of claim asserting that it was the successor-in-interest to the claim of Chase Cardmember Service (a creditor that was scheduled by the debtors). However, no evidence of assignment was attached to B-Real's proof of claim. The debtors objected to B-Real's claim on the basis that it failed to provide any "proof of assignment of authority." B-Real responded that it was "unable to produce anything with regards to the assignment" because the assignment was made as part of a bulk transfer. The bankruptcy court sustained the debtors' objection, stating: "I think it's entirely reasonable, if your guys want to play with assignments of claims, that you have a paper trail to back yourself up. Now if you were to come in with something showing you'd assigned – a bunch of claims had been assigned to you and that listed this claim, you'd be home free. Since you can't do that, it's your fault, not their fault." B-Real appealed to the B.A.P. arguing that a bankruptcy court may only disallow a claim if one of the enumerated reasons set forth in § 502(b) is applicable. The B.A.P. noted that the question was unresolved in the First Circuit and that other courts took either an "exclusive" or "nonexclusive" approach to the question. "Courts adopting the 'nonexclusive approach' hold that a claim can be disallowed for failure to attach supporting documents to a proof of claim as required by Rule 3001...Courts adopting the 'nonexclusive approach' hold that the list enumerated in § 502(b) is exclusive and that a claim cannot be disallowed for any reason other than those so listed...Even under the exclusive approach, however, a claim may be disallowed for failure to attach supporting documents if the

failure to attach the documents renders the claim unenforceable under state law...[U]nder Massachusetts law an assignee must prove through 'sufficient evidence' that it owns the account in question..." As a consequence of B-Real's failure to provide sufficient evidence of ownership of the claim, B-Real could not be considered a "creditor" of the debtors, which is a prerequisite to executing and filing a proof of claim. Accordingly, the B.A.P. affirmed the bankruptcy court's ruling sustaining the objection of the debtors to B-Real's claim.

### **Res judicata bars litigation of an argument that could have been raised in prior litigation.**

Milliren v. Milliren (In re Milliren), 387 B.R. 72 (B.A.P. 1st Cir. 2008).

The Bankruptcy Appellate Panel affirmed the bankruptcy court's denial of the debtor's Motion for Finding of Automatic Stay Violation and for Enforcement of the Automatic Stay (the "Motion"). On February 14, 2007, the bankruptcy court granted the debtor's ex-wife's motion for relief from the automatic stay, allowing her to pursue non-estate assets, which pursuit was ultimately brought before the probate court. The probate court held the debtor in contempt for failing to pay his ex-wife under a promissory note and committed the debtor to jail until he made such payments. The debtor appealed the probate court's order to the Massachusetts Appeals Court. The debtor also filed the Motion in the bankruptcy court, claiming that the probate court's order "violated the automatic stay because it required [him] to liquidate estate assets or be committed to jail." However, the debtor failed to raise that argument before the probate court. The bankruptcy court denied the Motion, deferring the matter to the probate court and explaining: "I think any relief that you need you're going to have to get from, the Probate Court and not from me, because I handed off to them when I signed that order on February 14th." The debtor appealed the bankruptcy court's ruling to the B.A.P. The B.A.P. affirmed the bankruptcy court's ruling and dismissed the appeal as "an impermissible attack on the Probate Court order which is barred under

the doctrine of res judicata or claim preclusion” because the debtor had an opportunity to make his argument before the probate court but failed to do so.

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## M. Ellen Carpenter Financial Literacy Program

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### Volunteer Training

January 7, 2009, 4:00 pm

The M. Ellen Financial Literacy Program, a joint program of the Bankruptcy Court and the BBA, will hold a Volunteer Training on January 7, 2009 from 4:00 pm to 5:00 pm at the BBA. The program uses volunteers to conduct classes on financial matters (including budgeting, personal finance, credit cards, and buying a car) in area high school across Massachusetts. The final class is a special session at the Bankruptcy Court on the consequences of credit misuse. A volunteer’s total time commitment (including training, preparation and class time) is expected to be no more than 6 hours. If you are interested in volunteering, please send your name and information to **Stephanie Lee**, Special Projects Assistant, Boston Bar Association, email: [slee@bostonbar.org](mailto:slee@bostonbar.org), tel. 617-778-1914.

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## Remember the Carpenter Fund and the Normandin Fund

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As year end approaches, please consider contributing to the **M. Ellen Carpenter Fund** and the **Charles P. Normandin Fund** of the Boston Bar Foundation, two funds which honor former colleagues and provide valuable support for the efforts of the Bankruptcy Section and the Boston Bar Association.

Established in memory of M. Ellen Carpenter, the first bankruptcy lawyer to serve as President of the BBA, the **Carpenter Fund** supports the public service programs of the BBA that focus on mentoring young people and creating opportunities for their personal and professional enrichment, such as the summer jobs program for Boston high school students run by the BBA.

The **Charles P. Normandin Fund** was established in honor of Charlie Normandin, an active member of the section, considered by many to be the “dean” of the bankruptcy bar. The **Normandin Fund** supports the pro bono, public service and civic programs founded or supported by the section, for example providing valuable funding for the financial literacy program and volunteer lawyer training.

Contributions to either the **Carpenter Fund** or the **Normandin Fund** may be sent to the Fund c/o Boston Bar Foundation, P.O. Box 845680, Boston, MA 02284-5680. For more information on either Fund or the Boston Bar Foundation, please feel free to contact **Rich Page**, BBF Executive Director, tel. **617-778-1916**, e-mail: [rpage@bostonbar.org](mailto:rpage@bostonbar.org).

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